JURUPAKAT SDN. BHD.

v.

KUMPULAN GOOD EARTH [1973] SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU
ZAKARIA YATIM J
[COMPANIES WINDING-UP NO. 42-132 OF 1987]
14 APRIL 1988

COMPANY LAW: *Winding up of company - Whether petitioner is a creditor - Whether respondent is a debtor - Where substantial dispute of debt whether petitioner entitled to issue s. 218 Notice.*

CIVIL PROCEDURE: *Application to strike out winding up petition - Whether affidavit evidence can be relied upon, whether delay of 5 months in filing application to strike out fatal.*

The petitioner issued a s. 218 notice demanding that the respondent pay the petitioner within 21 days the sum of RM2,938,651.97 (RM1,354,202.39 being balance of contract price together with the sum of RM1,584,449.58 being balance of agreed interest and other charges from 30 June 1986 till 31 August 1987) together with interest at the rate of 8% per annum from 1 September 1987. On 13 October the petitioner filed the petition to wind up the respondent.

In its affidavit filed in support of the application to strike out the petition, the respondent averred that there were no sums outstanding from the respondent in favour of the petitioner.

The Court had to consider whether on the facts that the petitioner is a creditor of the respondent and therefore entitled to proceed with the winding up of the respondent.

Held:

[1] From the evidence it was clear that the respondent disputed the alleged debt and that in the circumstances the petitioner is not a creditor within the meaning envisaged in s. 217 of the Companies Act and therefore is not entitled to issue the statutory notice or to file the petition in the present case as it had no *locus standi* to do so.

[2] That affidavit evidence was admissible in support of the application to strike out the petition as it was based on O. 18 r. 19(d).

[3] That a delay of 5 months in filing the application to strike out the petition by the respondent was not fatal to the application.

[Petition struck out.]

Cases referred to:
Re Lympne Investment Ltd. [1972] 2 All ER 385
Mann & Anor. v. Goldstein & Anor. [1968] 2 All ER 769
New Straits Times (M) Bhd. v. Kumpulan Kertas Niaga Sdn. Bhd. & Anor. [1985] 1 MLJ 226
Re St Piran Ltd. [1981] 3 All ER 270

Legislation referred to:
Companies Act 1965, ss. 217, 218, (2)(C)
Rules of the High Court 1980, O. 18 r. 19, (1)(a), (d)

Other source referred to:
Pennington's Company Law [1985], 5th Edn., p. 843

For the petitioner - Ong Ban Chai; M/s. Ong Ban Chai & Co.
For the respondent - S.P. Lim, (George Puthucheary with him) M/s. S.P. Lim & Co.
For the official assignee - Jegathesan

JUDGMENT

Zakaria Yatim J:

This is an application by the respondent company for an order of the Court that the petition filed by the petitioner to wind-up the respondent company be struck off and/or dismissed with costs under O. 18 r. 19 of the Rules of the High Court 1980 and under the inherent jurisdiction of the Court.

The respondent is a company registered in Malaysia and carries on the business of a housing developer. Its registered address is Suite D23, 2nd floor, Plaza Pekeliling, Jalan Tun Razak, Kuala Lumpur.

The petitioner is a contractor who, under an agreement, carried out works for the respondent company at Lot. 1055, 9th mile, Jalan Cheras, Kuala Lumpur.

The petitioner issued a notice to the respondent company under s. 218 of the Companies Act, 1965 demanding the respondent company to pay the petitioner, within twenty-one days from the date of the service of the notice, a sum of RM2,938,651.97 (RM1,354,202.39 being balance of contract price together with the sum of RM1,584,449.58 being balance of agreed interest and other charges from 30 June 1986 to 31 August 1987) together with interest thereon at the rate of 8% per annum from 1 September 1987.

On 12 October 1987 the petitioner filed its petition. According to the petition, the respondent company is indebted to the petitioner in the sum of RM2,938,651.97 (RM1,354,202.39 being balance of contract price together with the sum of RM1,584,449.58 being balance of agreed interest and other charges from 30 June 1986 to 31 August 1987) together with interest thereon at the rate of 8% per annum from 1 September 1987. The petition also states that the respondent company made no payment within a period of twenty one days as required in the notice. It will be noted that the petition is based only on the ground that the respondent was unable to pay its debt under s. 218(2)(C) of the Companies Act 1965.

In its affidavit opposing the petition, the respondent company avers as follows:- Sometime in 1983, the respondent company invited tenders from intending contractors to undertake building works namely, the construction of shop houses at Jalan Cheras, Selangor (the project). The petitioner was one of the tenderers with the highest tender price to RM14,111,000. Although the petitioner tendered the highest price, the respondent company, at the meeting of its directors on 11 July 1983, awarded the contract of the project to the petitioner. One of the main reasons as to why the petitioner was selected was because of an oral inducement and incentive of the petitioner's offer to discount the contract price of RM14,111,000 and the quantum of discount was fixed at 12.45% which discount was accepted by the board of directors and became an oral agreement. On 31 May 1986, there was a mutual agreement to determine the contract. Pursuant to the mutual agreement, the parties agreed to appoint a quantity surveyor to carry out final joint survey of the works done at the site by the petitioner up to 30 April 1986. It

was further agreed by both parties that the findings of the quantity surveyor would be final to the extent stated by him in the report and binding on both parties. The term of the said agreement is as follows:

> We, the undersigned, do hereby appoint and instruct Messrs Fong Seng Yong, Chartered Quantity Surveyor to carry out the final survey on site on our behalf of Works executed up to 30 April 1986 in respect of the above mentioned Works. The report and decision of Messrs Fong Seng Yong will be final and binding on us.

The above agreement was duly signed by both the petitioner and the respondent company. The quantity surveyor subsequently submitted his report where he arrived at a figure of RM10,747,260.20. According to the respondent company, a sum of RM9,375,568.29 ought to be deducted from the above sum, as monies already paid to the petitioner. The respondent company also deducted a further sum of RM1,074,762.02 being retention money.

The respondent company contended that having added all the deductions, there was no balance of contract sum outstanding in favour of the petitioner. Instead, the petitioner was in a debit balance to the extent of RM1,039,744. The respondent company contended that the alleged debt of RM1,584,449.58 arose from alleged breaches of contract on the part of the respondent company (See the affidavit of Ho Bok Sing filed on 8 March 1988 in support of the present application).

It is common ground that there is no judgment debt in the present case. The question for the Court to consider is whether the petitioner is a creditor and the respondent company a debtor. According to a learned commentator, a creditor is a person who can enforce his claim against the company by an action of debt, and a person cannot petition as a creditor when he merely has a right of action against the company for unliquidated damages for breach of contract (See *Pennington's Company Law* [1985], 5th Edn., p. 843). Where a petition is based on a debt which is disputed on substantial ground, the petitioner is not a creditor. See *Re Lympne Investments Ltd.* [1972] 2 All ER 385. If the petitioner is not a creditor, it is not entitled to present a petition or apply for a winding-up order. It has no *locus standi* and the petition must fail. See *Mann & Anor. v. Goldstein & Anor.* [1968] 2 All ER 769.

From the evidence adduced before this Court, it is clear that the respondent company disputes the alleged debt claimed by the petitioner. Indeed, the respondent company claims that the petitioner is in a debit balance to the extent of RM1,039,744. In the circumstances, the petitioner is not a creditor as envisaged in s. 217 of the Companies Act. The petitioner is therefore, not entitled to issue the statutory notice or file the petition in the present case, as it has no *locus standi*. The action of the petitioner in issuing the notice and filing the petition is, indeed, an abuse of the process of the Court.

Mr. Ong Ban Chai, Counsel for the petitioner, submitted that the Court should only consider the words of the petition and not rely on affidavit evidence. In support of his submission, he cited the case of *New Straits Times (Malaysia) Bhd. v. Kumpulan Kertas Niaga Sdn. Bhd. & Anor*. [1985] 1 MLJ 226. But in the present case, the respondent company is relying on O. 18 r. 19(1)(d) and not r. 19(1)(a). Therefore, affidavit evidence is admissible.

One final question to be considered is whether it is too late for the respondent company to make the present application. The petition was filed on 12 October 1987. A hearing date for the petition has already been fixed. The present application was filed on 8 March

1988, a delay of about five months. In my opinion, it is not too late for the respondent company to file the present application. See *Re St Piran Ltd*. [1981] 3 All ER 270. For the reasons stated above, the petition is struck-out under O. 18 r. 19(1)(d) of the Rules of the High Court and under the inherent jurisdiction of the Court. The petitioner will pay the cost of this application to the respondent company.

Also found at [1988] 2 CLJ 649